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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 591

ROY CURTIS CLEVELAND,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

PETITION FOR REHEARING

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes Roy Curtis Cleveland, the petitioner herein, and presents his petition for rehearing in the above entitled cause, upon the grounds, and for the reasons hereinafter set forth.

Questions Not Previously Presented.

1. Whether the petitioner had a constitutional right to a full appellate review by the Supreme Court of Illinois.

2. Whether the indictment bars a subsequent prosecution for the same offense.

3. Whether cruel and unusual punishment was inflicted.

4. Whether the imposition of the condition of probation relative to restitution constitutes involuntary servitude.

5. Whether the petitioner was deprived of his constitutional right to a fair trial.

Reasons For Granting Rehearing And Writ.

1. Petitioner had a constitutional right to a full appellate review by the Supreme Court of Illinois.

The new Judicial Article of the Constitution of the State of Illinois vested the judicial power in a Supreme Court, an Appellate Court and Circuit Courts. (Ill. Const. 1870, Art. VI, Sec. 5.)

The Judicial Article, among other things, provides that appeals from the final judgments of circuit courts shall lie directly to the Supreme Court as a matter of right in cases involving a question arising under the Constitution of the United States or of this State.

Here, an appeal from the final judgment of the Circuit Court was taken directly to the Supreme Court of Illinois as a matter of right. The State filed a motion to transfer the cause to the Appellate Court of Illinois, Second Judicial District, because a constitutional question was not involved. Objections thereto were filed by the petitioner. The motion was allowed and the cause transferred because a substantial constitutional question was not involved.

As shown in the petition for certiorari, this case involves questions arising under both constitutions.

The Judicial Article does not require that the case involve a substantial question. If it had been so intended, the word, substantial, would have been inserted in the proposed Judicial Article which was submitted to the electors at the general election in the State of Illinois

which was held on November 2, 1962, and was approved by them. The electors have spoken. Their decision is final. The Supreme Court of Illinois is not empowered to enlarge or limit their act.

The Supreme Court of Illinois had jurisdiction to review the final judgment of the Circuit Court. The appeal is a matter of right. To deprive the petitioner of the same violates both constitutions.

The appeal should have been heard by the Supreme Court of Illinois.

There was a flagrant denial of due process of law.

2. The indictment does not bar a subsequent prosecution for the same offense.

An intelligent and full understanding by the accused of the accusation against him is the first requirement of due process of law. To afford due process of law an indictment must fairly inform him of the charge against him and contain a statement of the acts which constitute the offense with reasonable definiteness and certainty so as to advise the accused what he has to meet and give him a fair and reasonable opportunity to prepare his defense and enable him to plead the judgment in bar of a subsequent prosecution for the same offense. (*People* v. *Peters*, 10 Ill. 2d 577.)

The indictment shall be a plain, concise and definite written instrument of the essential facts constituting the offense charged. (Fed. Rules of Crim. Proc. Rule 7 (c), 18 U.S.C.) The Illinois statute requires that the charge shall state an offense. (Ill. Rev. Stat. 1965, Chap. 38, Sec. 111-3.)

Notwithstanding these provisions, the courts below repeatedly have held that a charge in an indictment, even though in the language of the statute creating the offense, is not sufficiently specific and definite unless the statute, in creating the offense, specifically defines or describes the act or acts constituting the offense, so that the charge may be easily understood.

Generally, it is sufficient in an indictment to state the offense in the language of the statute in those cases where the statute clearly defines or describes the offense. (*Gallagher* v. *People*, 211 Ill. App. 158, *Brennan* v. *People*, 113 Ill. App. 361.) Where the statute, however, does not define or describe the act or acts constituting the offense, such acts must be specifically alleged. (*People* v. *Peters*, 10 Ill. 2d 577, *People* v. *Potter*, 5 Ill. 2d 365, *People* v. *Chiafreddo*, 381 Ill. 214, *People* v. *Green*, 368 Ill. 242, *People* v. *Brown*, 336 Ill. 257.)

Clearly, it is not sufficient to allege the offense of theft in the language of the statute, as was stated by the court below.

While an offense may be set forth in a statute with sufficient definiteness and certainty to satisfy constitutional requirements, it does not follow that an indictment in the language of the statute is sufficient to inform the accused of the nature and cause of the accusation, or to state an offense punishable under the statute, as required by the Constitution. Rather, where the statute does not define or describe the act or acts constituting the offense created, they must be specifically alleged. (Fed. Rules of Crim. Proc. Rule 7 (c), 18 U.S.C., Ill. Rev. Stat. 1965, Chap. 38, Sec. 111-3.)

Here, the facts are lacking.

The method by or manner in which unauthorized control was obtained over the property of the owner is not alleged. Surely, it is an essential element of the offense where the accusation, as in this case, is made against a public officer who was lawfully possessed of the property. The petitioner was the treasurer and a member of the Board of Trustees of the Cherry Valley Fire Protection District. The indictment should allege the public office, together with all the facts relative to the taking, carrying away, * * * or possession of the property.

There is no allegation of the time and place of the offense, except the date, September 30, 1966, and the county. It appears that a series of acts over a period of time was attempted to be shown by an Auditor's Report (See opinion of court below) which was wrongfully used by the trial judge. The failure to allege the same in the indictment is a fatal defect which renders it insufficient.

Likewise, there is no description of the property whatsoever. It is not sufficient to describe the property as merely "certain checks and money." An indictment is bad unless the number, date, amount, bank, payee and maker of the check or checks is alleged, or a copy thereof is attached as an exhibit. (*Farabee* v. *State,* ..... Tex. Cr. R. ....., 368 S.W. 2d 222, *Perry* v. *State,* 141 Tex. Cr. R. 291, 148 S.W. 2d 412, *Clines* v. *Commonwealth,* 221 Ky. 461, 298 S.W. 1107.) In *Perry* the court said,

> "That the check must be sufficiently described to identify it has been so frequently considered and the reason so thoroughly discussed that we deem it unnecessary to further treat the subject in this opinion."

In addition, the number, kind denomination, and amount of money must be alleged. An indictment which merely alleges the theft of certain checks and money, or of an aggregate amount is insufficient. Clearly, the indictment does not measure up to the requirements of the law.

Finally, there is no allegation of the value of the property. It is an essential element of the offense. (*People* v. *Mieschke,* 356 Ill. 263, *People* v. *Jackson,* 312 Ill. 611.) The value of the property must be alleged. (*People* v. *Meyers,* 397 Ill. 286, *People* v. *Crane,* 356 Ill. 276, *Brown* v. *People,* 173 Ill. 24, *Collins* v. *People,* 39 Ill. 233.) Here, the indictment alleged the value of the property as "not exceeding One Hundred Fifty Dollars ($150.-00)." Clearly, the allegation is insufficient. The petitioner had a constitutional right to have the exact value alleged. An allegation of value is also necessary where the grade or degree of the offense, or the extent of the punishment, depends on such value.

A diligent search has been made, but no case has been found which is squarely in point one way or the other. Perhaps one reason for the inability to find such a case is that it appears from the reported cases that through the years draftsmen of indictments have made it a practice to allege the facts in greater detail. It must be kept in mind in this connection that an accused is presumed to be innocent until he is proven guilty beyond a reasonable doubt and to a moral certainty, and that an indictment must be tested upon the presumption that the accused has no knowledge of the facts charged against him. (*White* v. *United States,* 10 Cir., 67 F. 2nd 71.) It is also indeed significant that the State did not cite a single case in the court below which was in point.

The indictment is vague, indefinite and uncertain. It is void.

The petitioner, however, was deprived of substantial rights. He was greatly prejudiced thereby. Although the constitutionality of the Illinois statute and other substantial federal questions are involved, the insufficiency of the indictment is the most important issue raised. It is the most defective indictment which appears in the reported cases. It so grossly violates the 14th Amendment to the Constitution of the United States that justice requires a reconsideration of the indictment.

The motion to dismiss the indictment should have been allowed by the trial court. The judgment of the court below should be vacated.

Again, there was a denial of due process of law.

3. Cruel and unusual punishment was inflicted.

The 8th Amendment to the Constitution of the United States states, in part, that "cruel and unusual punishments (shall not be) inflicted."

This amendment has its origin in a 1688 Act of Parliament. When it was being debated in Congress a member "objected to the words 'nor cruel and unusual punishment' the import of them being too indefinite." (Annals of Congress 754 (1791)). Another member objected:

> ". . . it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the

> Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind." *Ibid.*

The older cases held that this amendment does not apply to the states. In later cases, first by dicta (*Louisiana* v. *Resweber,* 329 U.S. 459 (1946)), and then by express holding (*Robinson* v. *California,* 370 U.S. 660 (1962)), it was ruled that the 8th Amendment is applicable to the states under the due process clause of the 14th Amendment.

In *Wilkerson* v. *Utah,* 99 U.S. 130 (1879), the Court upheld execution by shooting as against the objection that it was cruel and unusual.

Construing a similar clause in the New York State Constitution the Court said in *In Re Kemmler,* 136 U.S. 436, 446 (1890):

> "... So that, if the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."

A California law which made the "status" of narcotic addiction a criminal offense was held to be a cruel punishment. (*Robinson* v. *California,* 370 U.S. 660 (1962).) A jail sentence of three to ten years for "practicing law without a license" does not constitute "cruel and unusual punishment." (*Morgan* v. *U. S.,* 309 F. 2d 234 (1962).) Imposition of severe penalties for sex crimes is not cruel and unusual punishment. (*U. S.* v. *Wilkins,* 305 F. 2d 715, cert. den. 371 U.S. 929 (1962); *Maxwell* v. *Stephens,* 229 F. Supp. 205, 217 (1964).)

However, in *Rudolph* v. *Alabama,* 375 U.S. 889 (1963), where the majority refused to grant certiorari to review a death sentence for rape, three justices joined in this dissent:

> "(1) In light of the trend both in this country and throughout the world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate 'evolving standards of decency that mark the progress of (our) maturing society,' or 'standards of decency more or less universally accepted?'
>
> "(2) Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against 'punishments which by their excessive . . . severity are greatly disproportioned to the offenses charged?'
>
> "(3) Can the permissible aims of punishment (e. g., deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death (e. g., by life imprisonment); if so, does the imposition of the death penalty for rape constitute 'unnecessary cruelty?' "

And in *Trop* v. *Dulles,* 356 U.S. 86 (1959), forfeiting the citizenship of a soldier who deserts in time of war was called a cruel and unusual punishment by the Chief Justice and three other justices constituting the majority.

A similar result was reached in *Rusk* v. *Cort,* 372 U.S. 144 (1963), where a statutory forfeiture of the citizenship of a draft evader who moved to Czechoslovakia was set aside as an unconstitutional punishment. And suspension of sentence on the ground that the immigrant perjurer depart from the United States was held to be a cruel and unusual punishment in *Dear Wing Jung* v. *U. S.,* 312 F. 2d 72 (1962).

On the other hand forfeiting the citizenship of one who served as military executioner for Fidel Castro was

upheld in *U. S. ex rel Herman Marks* v. *Esperdy,* 315 F. 2d 673, affirmed 12 L. Ed. 2d 292 (1963), over the argument that "it imposes a cruel and inhuman punishment in violation of the Eighth Amendment."

Inclusion of 20 lashes as part of defendant's sentence for robbery does not constitute cruel and unusual punishment. (*Balser* v. *State,* Del. 195 A. 2d 757 (1963).) And in the much-publicized St. Louis Jefferson Bank lie-in demonstrations, it was held that jail sentences of up to 270 days for indirect contempt in violating a temporary restraining order were not cruel and unusual punishments. (*Curtis* v. *Tozer,* Mo. App. 374 S.W. 2d 557 (1964).)

As indicated, the cruel and unusual punishments clause is the object of increased attention by lawyers and courts. Some contend that the words are being stretched too far and that the Father of our Country would be startled to read recent opinions saying that it is a cruel and unusual punishment to deprive a wartime deserter or draft dodger of citizenship. For instance, Justice Frankfurter, dissenting in *Trop* v. *Dulles,* 356 U.S. 86 (1958), said at page 125:

> ". . . To insist that denationalization is 'cruel and unusual' punishment is to stretch that concept beyond the breaking point. It seems scarcely arguable that loss of citizenship is within the Eighth Amendment's prohibition because disproportionate to an offense that is capital and has been so from the first year of Independence. . . . Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?"

Others rejoice that the courts are so conscious of the language of the Bill of Rights.

Various courts have considered the cruel and unusual punishments provision, but because of the very nature of the provision no fixed definition has been attempted. In *Wilkerson* v. *Utah,* 99 U.S. 130 (1879), this Court said at pages 135-136:

> "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, * * * and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution."

Here again, it is the nature of the crime and the particular facts and circumstances, considered in the light of contemporary human standards, which determine whether a particular punishment is cruel and unusual. As a punishment for certain serious crimes, the death penalty is not cruel and unusual, whether executed by shooting, *Wilkerson* v. *Utah,* 99 U.S. 130 (1879), or by lethal gas, *Hernandez* v. *State,* Ariz. 32 P. 2d 18 (1934). Nor in a recent case was a sentence of 3 years imprisonment plus 20 lashes for grand larceny considered by a State court to be a violation of the 8th Amendment. (*Cannon* v. *Delaware,* Del. 196 A. 2d 399 (1963).)

On the other hand, where a statute prescribed a penalty of from 12 to 20 years imprisonment plus a fine for "entry of known false statements in a public record" it was found to be so out of proportion to the crime as to constitute cruel and unusual punishment. (*Weems* v. *United States,* 217 U.S. 349 (1910).) Similarly, this Court determined that a California statute which punished narcotics addiction as a crime was a cruel and unusual punishment. In *Robinson* v. *California,* 370 U.S. 660 (1962), this Court said at page 666:

> "(I)n the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."

It is not always easy, however, for courts or judges to agree as to what constitutes cruel and unusual punishment. In 1947, a most unusual case arose. A man named Francis was convicted of murder in Louisiana and was sentenced to death. As was customary, the electric chair was brought to the local jail for the execution. On May 3, 1946, Francis was duly "electrocuted" but the shock failed to kill him or even to injure him seriously. A new warrant was issued for his execution, but he argued that it would be cruel and unusual punishment to execute him twice for the same crime. Four Justices assumed, without deciding, that the 8th Amendment applied to the State, but under the circumstances they did not consider a second execution to be cruel and unusual punishment. Another Justice indicated that the 8th Amendment did not apply to the State, but that the Due Process Clause of the 14th Amendment would, itself, bar cruel and unusual punishment. He did not, however, consider the second execution to be a violation of due process in this case. Four dissenting Justices, however, described the case as "death by installments" and thought that the second execution should be barred by the 8th and 14th Amendments. *Louisiana ex rel. Francis* v. *Resweber,* 329 U.S. 459 (1947). Ultimately, Francis was executed. See Prettyman, Death and the Supreme Court, Ch. 3 (1961).

To be cruel and unusual punishment need not involve physical suffering. In *Trop* v. *Dulles,* 356 U.S. 86 (1958),

this Court held that the loss of citizenship as punishment for wartime desertion from the military was cruel and unusual punishment barred by the 8th Amendment. This Court said at page 101:

> "There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."

It should be clear that the 8th Amendment is not a relic of the "Dark Ages." Many problems remain today.

In recent years, nationwide attention has been focused on the question whether long delay of execution is in itself a cruel and unusual punishment. In the *Chessman* case the argument was made—and rejected—that repeated postponement of execution, even though occasioned by the legal actions instituted by the condemned man, resulted in such mental strain that execution after long delay would be cruel and unusual punishment. A similar argument might be made in the case of one whose execution was postponed because of insanity, but who, regaining sanity after several years, is ordered to be executed. Indeed, some have raised the question whether, by contemporary standards, the death penalty itself might not be cruel and unusual punishment.

The 8th Amendment, then, like the other amendments, leaves many questions still unanswered, but the sentence of an aged person who is not in good physical condition to the Illinois State Farm is cruel and unusual punishment.

Again, there was a denial of due process of law.

4. The imposition of the condition of probation relative to restitution constitutes involuntary servitude.

The 13th Amendment to the Constitution of the United States provides:

> "Neither slavery nor involuntary servitude except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The amendment had as its aim the maintenance of a system of completely free and voluntary labor throughout the United States. Accordingly, there is no rule of law under which any man in this country will be forced to serve with his labor any other man whom he does not wish to serve.

As used in the amendment, "involuntary servitude" is the condition of one who is compelled by force, coercion, or imprisonment and against his will to labor for another whether or not he is paid, and includes "peonage".

The leading purpose of the amendment was to abolish African slavery in the United States. But the addition of the words "involuntary servitude" to the prohibition of the amendment gave it a broader scope, and it has been applied to any servitude in fact involuntary, no matter under what form such servitude may have been disguised. (*Butler* v. *Perry,* 240 U.S. 328, 332, 36 S. Ct. 258, 60 L. ed. 672 (1916).) The constitutional guaranty, however, does not prevent the enactment of a law requiring the performance of labor in the public service, as in working the public roads or otherwise in lieu of taxes.

The service of seamen is regarded as exceptional (*Robertson* v. *Baldwin,* 161 U.S. 275, 17 S. Ct. 326, 41 L. ed. 715 (1897)), and accordingly seamen who have voluntarily entered into a contract for a period of service are held to have surrendered for the time their personal liberty, so that neither the contract itself nor a statute authorizing it constitutes a violation of the guaranty.

Involuntary servitude as a punishment for crime whereof the party has been duly convicted is expressly exempted from the operation of the amendment and may therefore be required. (*Loeb* v. *Jennings,* 133 Ga. 796, 67 S.E. 101, *Nelson* v. *People,* 33 Ill. 390 (decided in 1864 under a statute making it a crime for a negro or mulatto to come into the state, and holding the statute valid notwithstanding the prohibition of slavery and involuntary servitude in the state constitution)).

And the term "crime" as used in the amendment includes misdemeanors (*Stone* v. *Paducah,* 120 Ky. 322, 86 S.W. 531; *In Re Bergin,* 31 Wis. 383), and violations of municipal ordinances (*Loeb* v. *Jennings,* 133 Ga. 796, 67 S.E. 101, *Chicago* v. *Williams,* 254 Ill. 360, 98 N.E. 666, *Chicago* v. *Coleman,* 254 Ill. 338, 98 N.E. 521).)

Mere imprisonment is not servitude (*Smolczyk* v. *Gaston,* 147 Neb. 681, 24 N.W. 2d 862), but labor enforced as a punishment is involuntary servitude.

The petitioner was sentenced to the Illinois State Farm. He is required to work on the farm. (Ill. Rev. Stat. 1969, Chap. 118, Sec. 16). This constitutes involuntary servitude.

In addition, to an aged person who is not in good physical condition, but is required to work, the sentence may constitute a death sentence.

Again, there was a denial of due process of law.

5. Petitioner was deprived of his constitutional right to a fair trial.

In all criminal prosecutions, an accused, guilty or innocent, is entitled to a fair trial. It is the greatest human right that he has.

It is the duty of the trial judge to so conduct the proceedings that the accused will have a fair trial. It is not a mere formality, but it is a substantial right.

Here, the petitioner filed a motion for a change of venue from all the judges of the county. The motion was granted by the Chief Judge. An Associate Judge from another Judicial Circuit was assigned by the Supreme Court of Illinois to hear the case.

He first heard a motion to dismiss the indictment. In it the petitioner, among other things, raised the constitutionality of the statute upon which the indictment was based. He held the statute constitutional and the indictment sufficient. The indictment was void, but the motion was denied.

The petitioner entered a plea of guilty to the indictment which charged the theft of "certain money and checks", having a value of $150.00. It was accepted.

Although an auditor's report showed a purported loss of a large sum of money, it was not a part of the trial court record. It was incomplete and contained comments, statements and conclusions. It also was not verified.

First, the record does not contain any stipulation of the State and the petitioner that an auditor's report was to stand in lieu of a bill of particulars. It is completely devoid of such a stipulation.

Second, the auditor's report was not made a part of the record.

Third, although the auditor's report was not made a part of the record, it was considered by the trial judge in determining whether probation should be granted or denied, and also whether confinement and restitution should be made conditions of probation.

Fourth, consideration of the auditor's report by the trial judge involved the use of hearsay, and the right of cross examination as to the validity and accuracy of the purported examination by the auditor was denied.

Lastly, the court below by mistakenly considering a stipulation which was not made, and also considering an auditor's report which was not a part of the record, deprived the petitioner of his liberty and property without due process of law.

Clearly, the court below was wrong in mistakenly considering a stipulation which was not made, and also in considering an auditor's report which was not a part of the record. Such a departure from long established precedent denied the petitioner due process of law.

Furthermore, when the court below mistakenly considered a stipulation which was not made, and also considered an auditor's report which was not a part of the record, the trial judge was permitted to use the auditor's report in imposing sentence. The trial judge used the auditor's report in deciding that the petitioner should be imprisoned in the Illinois State Farm at Vandalia, Illinois, for a period of five months as a condition of probation, and also that within 30 days from the date of his release, a final amount of restitution shall be determined upon agreement by the petitioner or by the

court order and within 90 days after said amount has been established, said amount shall be paid in full. The use of the auditor's report involved hearsay and the right of cross examination as to the validity and accuracy of the purported examination by the auditor was denied. (U. S. Const. Amend. 6, *Berger* v. *California,* 393 U.S. 314, 89 S. Ct. 540, 21 L. ed. 2d 508 (1969), *Pointer* v. *Texas,* 380 U.S. 400, 85 S. Ct. 1065, 13 L. ed. 2d 923 (1965), *People* v. *Crews,* 38 Ill. 2d 331 (1967).)

It appears that the court below did not consider whether the trial judge abused its discretion in requiring confinement as a condition of probation. (A. 22.)

First, the trial judge allowed his strong feeling relative to public officers to influence his judgment concerning confinement. He said that he had strong feelings about what should be done with public officers who violated the public trust. His remarks were indeed prejudicial. The recent case of *People* v. *McAndrew,* 96 Ill. App. 2d 441, 239 N.E. 2d 314, 319 (1968), is applicable here. In that case the strong feelings of the trial judge relative to "hippies and narcotics" influenced his decision concerning the sentence imposed. Although probation was granted in this case, subject to the condition that the petitioner serve five months confinement, the theory of *McAndrew* is applicable.

Contrary to the recommendation of the probation officer, the trial judge imposed confinement. It was an arbitrary abuse of discretion.

Second, the court below did not mention the fact that the petitioner had not been involved in any prior trouble. He had served as a Justice of the Peace. He is also a veteran of World War I. He was then 72 years of age and not in physical condition to serve any confinement,

particularly in the Illinois State Farm where he would be associated with the usual misdemeants imprisoned there. Failure to consider these factors constituted an abuse of discretion by the trial judge in imposing five months confinement as a condition of probation. The probation officer had recommended probation. He had made the investigation and was familiar with the background, life, family, previous occupations and public service of the petitioner. The trial judge who was from another Judicial Circuit and was an Associate Judge and not a full Circuit Judge lacked experience, but he was determined to impose confinement as a condition of probation. Surely, conviction and probation without confinement, coupled with many articles in the press, was sufficient punishment against any person who did not have a prior record. Neither the public interest nor the rehabilitation of the petitioner required that he receive the penalty provided for the offense or any other penalty. (Ill. Rev. Stat. 1965, Chap. 38, Sec. 117-1.) The recent case of *People* v. *Harpole,* 97 Ill. App. 2d 28, 239 N.E. 2d 471 (1968), indicates that the sentence to be imposed should be the one

> "which has the greatest potential of restoring the offender to a useful and productive place in society while at the same time adequately punishing the offender for his misconduct and safeguarding the public from further offenses . . ."

The court also indicated its disapproval of a sentence which is based upon a controlling factor of restitution as a theory of penology.

It appears that the trial judge was biased and prejudiced against the petitioner. A good judge is fair and impartial at all times. He should not consider any im-

proper evidence. He should at all times maintain an impartial attitude in his acts, conduct and demeanor. The utmost care should be exercised because any comment or remark which is shown to be prejudicial to the rights of the accused, or which it may be assumed prejudice will result therefrom, is fatal to the validity of the trial.

The petitioner is entitled to a new hearing of his petition for release on probation. His confinement and restitution should be vacated. The case should be assigned to another judge who will not deprive him of his constitutional right to a fair trial.

Again, there was a denial of due process of law.

Conclusion.

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, the petitioner prays that this Court grant a rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

JOHN R. SNIVELY,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

JOHN R. SNIVELY,
Counsel for Petitioner.